

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BUNGIE, INC., a Delaware corporation,

Plaintiff-  
Counterdefendant,

v.

AIMJUNKIES.COM, a business of  
unknown classification; DAVID  
SCHAEFER, an individual; JORDAN  
GREEN, an individual; JEFFREY  
CONWAY, an individual; and JAMES  
MAY, an individual,

Defendants,

and,

PHOENIX DIGITAL GROUP LLC, a  
Delaware limited liability company; and  
JAMES MAY, an individual

Defendants-  
Counterclaimants

No. 2:21-cv-811-TSZ

PLAINTIFF-COUNTERDEFENDANT  
BUNGIE, INC.'S ANSWER TO AMENDED  
COUNTERCLAIMS AND AFFIRMATIVE  
DEFENSES

Plaintiff and Counterdefendant Bungie, Inc. ("Bungie"), by and through its undersigned attorneys, submits this answer and affirmative defenses in response to Defendants and Counterclaimants Phoenix Digital Group, LLC's ("Phoenix Digital") and James May's Amended

ANSWER TO AMENDED  
COUNTERCLAIMS  
(No. 2:21-CV-811-TSZ) –1

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1 Counterclaims. Bungie denies, except where expressly admitted, each allegation in the  
 2 Amended Counterclaims. Bungie includes the headings used in the Amended Counterclaims  
 3 solely for convenience and ease of reference and denies any allegations, assertions, or inferences  
 4 contained therein.

5 **First Amended Counterclaim of James May for**  
 6 **Unauthorized Access With Intent to Defraud**  
**18 U.S.C. § 1030(a)(4)**

7 1. Bungie lacks knowledge or information sufficient to form a belief about the truth  
 8 of the allegations in this paragraph, and on that basis denies the allegations therein.

9 2. Bungie lacks knowledge or information sufficient to form a belief about the truth  
 10 of the allegations in this paragraph, and on that basis denies the allegations therein.

11 3. Bungie lacks knowledge or information sufficient to form a belief about the truth  
 12 of the allegations in this paragraph, and on that basis denies the allegations therein.

13 4. Bungie lacks knowledge or information sufficient to form a belief about the truth  
 14 of the allegations in this paragraph, and on that basis denies the allegations therein.

15 5. Bungie lacks knowledge or information sufficient to form a belief about the truth  
 16 of the allegations in this paragraph, and on that basis denies the allegations therein.

17 6. Bungie admits that May accepted the terms of the Limited Software License  
 18 Agreement in at least October and November 2019.

19 7. Bungie admits that Exhibit 6 to the Amended Complaint (Dkt. No. 34-1 p. 18–27)  
 20 and Exhibit A to the Amended Counterclaims is a copy of Bungie’s Limited Software License  
 21 Agreement (“LSLA”). Bungie denies any remaining allegations in this paragraph.

22 8. Bungie admits that the LSLA references and incorporates a “Privacy Policy.”  
 23 Bungie admits that a document titled “Bungie Privacy Statement” is attached to the Amended  
 24 Counterclaim as Exhibit B. Exhibit B speaks for itself. Bungie denies any remaining allegations  
 25 in this paragraph.  
 26

1           9. Paragraph 9 calls for a legal conclusion to which no response is required. The  
2 content of the LSLA speaks for itself. To the extent a response is required, Bungie denies the  
3 allegations in this paragraph.

4           10. Paragraph 10 calls for a legal conclusion to which no response is required. The  
5 content of the Privacy Policy speaks for itself. To the extent a response is required, Bungie  
6 admits that Section 2(a) of the Privacy Policy is entitled “Information We Collect,” and Bungie  
7 denies any remaining allegations in this paragraph.

8           11. Bungie denies the allegations in this paragraph.

9           12. Bungie admits it produced a document bearing Bates number  
10 BUNGIE\_WDWA\_0000409 on or about July 25, 2022. Bungie lacks knowledge or information  
11 sufficient to form a belief about the truth of the remaining allegations in this paragraph, and on  
12 that basis denies the allegations therein.

13           13. The deposition transcript speaks for itself. Bungie denies the characterization of  
14 the testimony as alleged in this paragraph.

15           14. Bungie denies the allegations in this paragraph.

16           15. Bungie denies the allegations in this paragraph.

17           16. Bungie admits that document Bates numbered BUNGIE\_WDWA\_0000409  
18 contains some file identifiers. Bungie denies that May owns and holds copyrights to the  
19 identified file. Bungie lacks knowledge or information sufficient to form a belief about the truth  
20 of the remaining allegations in this paragraph, and on that basis denies the allegations herein.

21           17. Bungie denies the allegations in this paragraph.

22           18. Bungie denies that May holds copyrights to the identified file. Bungie lacks  
23 knowledge or information sufficient to form a belief about the truth of the remaining allegations  
24 in this paragraph, and on that basis denies the allegations therein.

25           19. Bungie lacks knowledge or information sufficient to form a belief about the truth  
26 of the allegations in this paragraph, and on that basis denies the allegations therein.

1           20. Bungie admits that Exhibit D is a document Bungie produced bearing Bates No.  
2 BUNGIE\_WDWA0000367 and was produced by Bungie on or about July 25, 2022. Bungie  
3 lacks knowledge or information sufficient to form a belief about the truth of the remaining  
4 allegations in this paragraph, and on that basis denies the allegations therein.

5           21. Bungie denies that Exhibit D demonstrates it collected data from May without  
6 May's authorization and denies that May holds copyrights to the identified file. Bungie lacks  
7 knowledge or information sufficient to form a belief about the truth of the remaining allegations  
8 in this paragraph, and on that basis denies the allegations therein.

9           22. Exhibit D speaks for itself. Bungie admits that May used files signed by Phoenix  
10 Digital Group LLC in connection with reverse engineering *Destiny 2*. Bungie denies the  
11 remaining allegations in this paragraph.

12           23. Bungie denies the allegations in this paragraph.

13           24. Bungie denies the allegations in this paragraph.

14           25. Bungie denies the allegations in this paragraph.

15           26. Bungie lacks knowledge or information sufficient to form a belief about the  
16 contents of the "reclasskerney64.pbd" file and on that basis denies the allegations regarding that  
17 file. Bungie denies the remaining allegations in this paragraph.

18           27. Bungie denies the allegations in this paragraph.

19           28. Exhibit D speaks for itself. Bungie denies Defendants' characterization of the  
20 document and what it "demonstrates." Bungie lacks knowledge or information sufficient to form  
21 a belief about the truth of the allegations in this paragraph, and on that basis denies the  
22 allegations therein.

23           29. Bungie denies the allegations in this paragraph.

24           30. Bungie denies the allegations in this paragraph.  
25  
26

31. Bungie admits that May agreed to the LSLA and Privacy Policy on at least 102 occasions. Bungie lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph, and on that basis denies the allegations therein.

32. Bungie denies the allegations in this paragraph.

33. Bungie denies the allegations in this paragraph.

34. Bungie denies that it brought fraudulent and meritless claims against Defendants, and as found in the Arbitrator's February 1, 2023 Final Award, Defendants are liable for several causes of action, including breach of contract, tortious interference, and circumvention of technological measures and trafficking in circumvention devices in violation of the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201(a) and 1201(b)(1), resulting in an award of \$3,657,500 in statutory damages to Bungie, and Bungie's attorneys' fees and costs, including for spoliation. *See* Dkt. No. 88. Bungie also denies the remaining allegations in this paragraph.

35. Bungie denies the allegations in this paragraph.

36. Bungie denies the allegations in this paragraph.

37. Bungie denies the allegations in this paragraph.

38. Bungie denies the allegations in this paragraph.

39. Bungie denies the allegations in this paragraph.

**Second Amended Counterclaim of James May For Theft of Computer Data  
18 U.S.C. § 1030(a)(2)(C)**

40. Bungie incorporates its responses to the foregoing paragraphs as if fully set forth herein.

41. Bungie lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and on that basis denies the allegations therein.

42. Bungie denies the allegations in this paragraph.

43. Bungie denies the allegations in this paragraph.

44. Bungie denies the allegations in this paragraph.

45. Bungie denies the allegations in this paragraph.

46. Bungie denies the allegations in this paragraph.

**Third Amended Counterclaim of James May For Unauthorized Access  
18 U.S.C. § 1030(a)(5)(C)**

47. Bungie incorporates its responses to the foregoing paragraphs as if fully set forth herein.

48. Bungie lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and on that basis denies the allegations therein.

49. Bungie denies the allegation in this paragraph.

50. Bungie denies the allegations in this paragraph.

51. Bungie denies the allegations in this paragraph.

52. Bungie denies the allegations in this paragraph.

53. Bungie denies the allegations in this paragraph.

**Fourth Amended Counterclaim of James May For  
Circumvention of Technological Measures  
17 U.S.C. § 1201(a)**

54. Bungie incorporates its responses to the foregoing paragraphs as if fully set forth herein.

55. Bungie lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and on that basis denies the allegations therein.

56. Bungie denies the allegations in this paragraph.

57. Bungie denies the allegations in this paragraph.

58. Bungie denies the allegations in this paragraph.

59. Bungie denies the allegations in this paragraph.

60. Bungie denies the allegations in this paragraph.

**First Amended Counterclaim of Phoenix Digital Group LLC  
For Breach of Contract**

61. Paragraph 61 does not set forth factual allegations to which a response is required.

62. Bungie incorporates its responses to the foregoing paragraphs as if fully set forth herein.

63. Bungie lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and on that basis denies the allegations therein.

64. Bungie lacks knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and on that basis denies the allegations therein.

65. The referenced Terms of Service speaks for itself.

66. The referenced Terms of Service speaks for itself.

67. The referenced Terms of Service speaks for itself.

68. The referenced Terms of Service speaks for itself.

69. Bungie admits that obtained access to the “cheat software” on or about January 2020 with a purchaser using the name Martin Zeniu. Bungie lacks knowledge or information sufficient to form a belief about the truth of any remaining allegations in this paragraph, and on that basis denies the remaining allegations therein.

70. Bungie admits the allegations in this paragraph.

71. Bungie denies the allegations in this paragraph.

72. Bungie denies the allegations in this paragraph.

73. Bungie denies the allegations in this paragraph.

74. Bungie denies the allegations in this paragraph.

75. Bungie denies the allegations in this paragraph.

**Second Amended Counterclaim of Phoenix Digital For  
Circumvention of Technological Measures  
17 U.S.C. § 1201(a)**

Phoenix Digital’s Second Amended Counterclaim was dismissed with prejudice pursuant to the Court’s February 3, 2023 Order (Dkt. No. 84). Therefore, Bungie is not required to answer the remaining paragraphs 76 through 82, which relate solely to that claim. To the extent any response to these paragraphs is required, Bungie denies the allegations therein.

## AFFIRMATIVE DEFENSES

By raising the following defenses, Bungie does not assume the burden of proof of any issue that, as a matter of law, is Counterclaimants' burden to prove. Bungie further does not admit any allegation of the Counterclaims not otherwise admitted and expressly incorporates the admissions and denials in each and every paragraph above. Bungie reserves the right to amend or augment these defenses based on further investigation and discovery.

1. Counterclaimants fail to state a claim upon which relief can be granted.

2. By accepting Bungie's Limited Software License Agreement ("LSLA") and Privacy Policy, May authorized Bungie to collect information about his use of the Bungie Services, actions taken within the Bungie Services, and his device, including his computer. The information that May alleges Bungie collected from May's device(s) is the type of information that May authorized Bungie to collect. May consented to Bungie's alleged access of May's computer(s), file(s), information, data, and/or copyrighted work(s).

3. By accepting Bungie's Limited Software License Agreement ("LSLA") and Privacy Policy, May authorized Bungie to collect information about his use of the Bungie Services, actions taken within the Bungie Services, and his device, including his computer. The information that May alleges Bungie collected from May's device(s) is the type of information that May authorized Bungie to collect by accepting Bungie's LSLA and Privacy Policy. May granted Bungie a license to access May's computer(s), file(s), information, data, and/or copyrighted work(s).

4. In the Arbitrator's Final Award, Counterclaimants were found to have violated the Digital Millennium Copyright Act (17 U.S.C. §§ 1201(a), 1201(b)(1)) ("DMCA") and Washington Consumer Protection Act (RCW 19.86.020), and were found liable for breach of contract and tortious interference with a contract in connection with their development, sale, and distribution of Defendants' cheat software for Bungie's *Destiny 2* video game. The actions that form the basis of Counterclaimants' Amended Counterclaims—including May's surreptitious



1 attempts to reverse engineer *Destiny 2* using reverse engineering tools provided and signed by  
2 Phoenix Digital, and Phoenix Digital's trafficking in an illegal circumvention device—arise from  
3 Counterclaimants' development, sale, and distribution of Defendants' cheat software for *Destiny*  
4 2, and Bungie's subsequent investigation of Counterclaimants' unlawful conduct.  
5 Counterclaimants' Amended Counterclaims are barred by the doctrine of unclean hands.

6         5. As found in the arbitration Final Award between Bungie and Counterclaimants,  
7 Defendants' *Destiny 2* cheat software sold by Phoenix Digital is an illegal circumvention device  
8 that violates the DMCA, was developed through the unlawful circumvention of technological  
9 measures (also in violation of the DMCA and Bungie's LSLA), and tortiously interferes with  
10 Bungie's LSLAs with users of the cheat software that play *Destiny 2*. Phoenix Digital's Terms  
11 of Service, which apply to the sale/license of Defendants' *Destiny 2* cheat software, are void  
12 because they are in violation of public policy and/or illegal.

13         6. On information and belief, Phoenix Digital's Terms of Service did not exist at the  
14 time Bungie acquired Defendants' *Destiny 2* cheat software from the AimJunkies.com website.  
15 Alternatively, Phoenix Digital's Terms of Service were not presented to Bungie at the time of the  
16 purchase. Bungie did not agree or consent to the Phoenix Digital Terms of Service, and if such  
17 consent was obtained, it was obtained fraudulently.

18         7. Counterclaimants have failed to mitigate damages.

19         8. Counterclaimants' alleged damages arise from Bungie's filing and prosecution of  
20 this action and the parallel arbitration to protect its intellectual property and other rights. To the  
21 extent Counterclaimants' damages arise from that litigation-related conduct and/or statements,  
22 Bungie is immune from liability for some or all of the conduct alleged in the Amended  
23 Counterclaims under the litigation privilege.

24         9. Phoenix Digital lacks standing because Phoenix Digital does not claim to own the  
25 *Destiny 2* cheat software or the loader software used to distribute the cheat software that it  
26 alleges Bungie analyzed in violation of the Phoenix Digital Terms of Service.

**PRAYER FOR RELIEF**

WHEREFORE, Bungie prays for the following relief:

- A. Dismissal of the Amended Counterclaims with prejudice;
- B. That all remedies sought by Counterclaimants be denied;
- C. For the relief prayed for in Bungie's Amended Complaint;
- D. Bungie's costs of the suit, including reasonable attorneys' fees; and
- E. Such other relief as the Court may deem just and proper.

DATED this 17th day of February, 2023

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